No. 88-747

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CORPORATION,

Petitioner,

v.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondent,

and

HITACHI METALS, LTD., *ET AL.*,
VACUUMSCHMELZE GmbH,
NIPPON STEEL CORPORATION, *ET AL.*,
SIEMENS CAPITAL CORPORATION,

Respondents.

Brief For Respondents Hitachi Metals, Ltd., *et al.*, In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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Date: December 2, 1988

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QUESTIONS PRESENTED FOR REVIEW

The case at bar presents the following questions for review:

1. Whether the Federal Circuit correctly decided the narrow question of law that Allied had abandoned its right to challenge in 1987 the ITC's 1984 claim construction of Allied's U.S. Letters Patent 4,221,257 ('257 patent) where Allied, in the 1984 proceeding, a) in its petition to the ITC to review the Administrative Law Judge's Initial Determination did not raise the particular issue of claim construction which Allied now seeks to have reviewed, and b) in replying to respondent's petition to review claim construction told the ITC that the Administrative Law Judge's Initial Determination correctly construed the claims and should not be reviewed.

2. Whether there are any other grounds which preclude judicial review of claim construction, validity and infringement of the 257 patent.

3. Whether Allied's 257 patent would be invalid under 35 U.S.C. § 112 and 35 U.S.C. § 103 if Allied's proposed claim construction were to be accepted, and whether Allied would be precluded from arguing the validity of its patent if Allied's proposed claim construction were to be accepted.

STATEMENT PURSUANT TO RULE 28.1

I. Hitachi Metals, Ltd.'s parent company is Hitachi, Ltd. Hitachi Metals, Ltd.'s subsidiaries (except wholly owned subsidiaries) and affiliates are:

Goko Kosan Kabushikigaisha
Hitachi Metals Manpower Development Center
Hitachi Tool Engineering, Ltd.
Nippon Ferrite, Ltd.
Singapore Foundry & Machinery Co. Pte. Ltd.
Wakamatsu Techno-Service, Ltd.
Yasuki-Hagane, Ltd.
Aoyama Special Steels, Ltd.
Dina Flow, Ltd.
Hendrickson Asia, Ltd.
Hiyoshi Kozai, Ltd.
Hokuriku Goko
Matsumoto Tekkosho
Morris Electronics Ltd.
Moriya Hamono, Ltd.
Nam Yang Metals Co., Ltd.
Nihon Benkan Kogyo
Nihonkatantyutetsusho
Nichiei Kozai, Ltd.
Nisso Kosai, Ltd.
Okidai Kosakusho, Ltd.
Pacific Metals Co., Ltd.
Shihmen Ferrite Co., Ltd.
Sugiyama Chain Seisakusho
Taizu Ferrite Co., Ltd.
Tobata Kiko
Tokyo Seimitsukogyo
Toyo Seihaku
Tsutsumi Kinzoku

II. Hitachi Metals International, Ltd.'s parent company is Hitachi Metals, Ltd. Hitachi Metals International, Ltd.'s subsidiaries (except wholly owned subsidiaries) and affiliates are:

Erie-EMI Company

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STATEMENT OF THE CASE

The ITC instituted Investigation No. 337-TA-143 on April 13, 1983 under 19 U.S.C. § 1337 and § 1337(a) based on a complaint filed by petitioner, Allied, which had charged that a number of respondents, including HML, VAC and NSC[1] had committed unfair acts in the importation of certain amorphous metal alloys because the alloys were produced by a process which, if practiced in the United States, would infringe its U.S. Letters Patent 4,221,257 (the '257 patent). The ITC referred the investigation to an administrative law judge (A.L.J.) to conduct an evidentiary hearing.

On May 14, 1984, the A.L.J. issued an Initial Determination (ID) concluding that respondents had violated Section 337(a) with respect to the '257 process patent whose claims were construed in a manner to uphold their validity.

The '257 patent claims, as written, were held to be invalid under 35 U.S.C. §103 as obvious over the prior art:

> If the '257 *claims* (read literally) are compared with the prior art, however, the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art of casting

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[1] As used herein, "HML" refers to Hitachi Metals, Ltd. and Hitachi Metals International, Ltd., "VAC" refers to Vacuumschmelze GmbH and Siemens Capital Corporation, and "NSC" refers to Nippon Steel Corporation and Nippon Steel, U.S.A., Inc.

> amorphous metal. (emphasis in original) (CA28; CC28).[2]

The A.L.J. further held that the claims as written did not include the subject matter which the inventor regarded as his invention, namely, the use of a slotted nozzle with wide nozzle lips (CA14-20; CC14-20) and that the term "nozzle" in the '257 patent claims was ambiguous as to the structure of the nozzle.

The A.L.J. construed the claims of the '257 patent as requiring that the slotted nozzle have *wide lips*, and that such wide lips were to be understood to have the nozzle lip width dimensions which were stated to be "critical" in the '257 patent specification. On this basis, the thus-construed '257 patent was held not invalid under 35 U.S.C. §112. (CA24; CC24) (FF 336 and 337 at CA118; CC120) (FF 439 and 440 at CA150; CC153).

The '257 patent claims were also held to be unobvious over the prior art on the same basis, i.e., *if and only if* the '257 patent claims were construed as requiring the critical feature of "wide lips", *i.e.*, dimensions relating to the width of the lips of the slotted nozzle. (CA17, 38; CC17, 38). Thus, the A.L.J. "saved" the validity of the otherwise invalid (as written) claims of the '257 patent by construing them as including the critical wide lips dimensions:

> If the claims of the '257 patent are valid, it is only because the critical limitation relating

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[2] "A" citations are to pages of the Appendix to Allied's petition to this Court. "CA" and "CC" citations are to the Appendix in the Federal Circuit. "CC" citations are to the confidential portions of the Federal Circuit Appendix.

to the width of the lips was read into the claims. (CA44; CC44).

Consistent with the interpretation that the claims required wide lips, the ID stated that "if a respondent used a nozzle without wide lips, infringement could not be found." (CA44; CC44). (See also CA45; CC45).

Allied filed a petition for review of the ID on May 29, 1984. This petition requested the ITC to review a number of issues relating to the '257 patent, including various issues of "claim construction", i.e., the interpretation of the claims of the '257 patent. Allied asked the ITC to review issues of claim construction with respect to such phrases as "predetermined speed" which appeared in the claims, and "flat lips" which did not appear in the claims but which Allied alleged were required by the ID. Allied, however, did not seek review of the ID's conclusions that the '257 patent claims as written were invalid under 35 U.S.C. §103 over the prior art, or that the A.L.J. erred in holding that the '257 patent claims must be construed as requiring the critical limitations relating to the width of the nozzle lips in order to save their validity under 35 U.S.C. §§103 and 112. (CC10099-10109).

Respondents filed a Joint Petition for Review of the ID on patent validity issues. The Joint Petition raised different issues of "claim construction" than Allied had raised in its petition. Respondents' Joint Petition argued to the ITC, *inter alia*, that the A.L.J. erred as a matter of law in construing the '257 patent claims to include the "wide lips" to save their validity, and that the '257 patent claims should have been held

invalid under 35 U.S.C. §§103 and 112 without qualification.

Allied filed a response to respondents' petition, embraced the A.L.J.'s claim interpretation which was necessary to preserve the '257 patent's validity, and *expressly told the ITC not to review the issues* of claim interpretation and validity that *respondents' petition raised*. Allied argued:

> The ALJ found the word "nozzle" to be ambiguous and used the patent specification to *construe* this word to include "wide lips". The fault is not with the decision of the ALJ, but with the obvious mischaracterization of the holding by respondents. *No review of this issue is necessary*. (latter emphasis added) (CC10129).

At several other points in its response, Allied emphasized its agreement with the A.L.J.'s conclusions construing the '257 patent claims as requiring the critical dimensions of the width of the slotted nozzle lips to save their validity:

> [T]he ALJ properly construed the claims in light of the specification, and then compared the "specification construed" claims with the prior art. The "specification construed" claims were held to be valid over the prior art. (ID 48 and 59) (footnote omitted). (CC10130).
>
> * * *
>
> At page 44 of the ID the ALJ has correctly found that "[t]he '257 claims are construed

> as including the critical feature of the wide lips on the nozzle." (CC10131).

On July 6, 1984, the ITC denied Allied's and respondents' petitions to review the ID, and adopted the ID in its entirety (including its findings of fact) with its construction of the claims as including wide lips as urged by Allied as its determination. A Commission Action and Order, including a general exclusion order, was issued on October 15, 1984 with respect to the '257 patent. This Action and Order specifically adopted the underlying ID, thereby adopting the ID's various holdings on claim construction. (CA758).

After the ITC's July 6, 1984 determination construing the scope of Allied's '257 patent claims, HML developed a new process for the production of amorphous metal ribbon products which HML believed to be non-infringing in view of the ITC's interpretations regarding the '257 patent claim scope and in view of the ITC's determination as to what processes would not infringe.

On July 26, 1985, upon HML's motion, the ITC ordered that advisory opinion proceedings be instituted pursuant to 19 C.F.R. §211.54(b). The ITC referred HML's motion to the A.L.J. for plenary adversary proceedings. The ITC also ordered the A.L.J. to preside over a proceeding to consider modifying the October 15, 1984 general exclusion order and to recommend modification thereof, if deemed appropriate.

During prehearing conferences with the A.L.J. prior to the evidentiary hearing during the week of November 11, 1985, counsel for Allied, HML and VAC

reached agreement as to issues that would be litigated in the advisory opinion proceeding. It was agreed that the holdings as to validity of the '257 patent claims that had been adjudicated in the ITC's 1984 final determination would *not* be relitigated, and that the ITC's 1984 holdings as to the proper scope of the '257 patent claims would govern the questions of infringement (under the doctrine of equivalents) of the previously construed claims. In other words, no issues decided in the 1984 hearing would be relitigated. See (CA794A), (CA794B), (CC461), (CC465), (CA215, CC282), (CC10136), (CA1656-1664), (CA1662).

On March 3, 1986 the A.L.J. issued her initial advisory opinion (IAO) in which she found that HML's new process did not infringe the '257 patent under the doctrine of equivalents.

On March 28, 1986, Allied filed a petition for review of the IAO, requesting the ITC to review the A.L.J.'s conclusions on noninfringement in the IAO. In this petition, Allied also requested ITC review of issues that Allied had agreed not to relitigate in the advisory opinion proceeding, and which, in fact, had not been relitigated.

The ITC issued an advisory opinion on May 29, 1987, concluding that HML's and VAC's new processes would not infringe the '257 patent claims if practiced in the United States, and therefore that amorphous metals manufactured by such non-infringing processes are not covered by the October 15, 1984 general exclusion order. (CA363, 399-400; CC427-428). The ITC discussed the previous interpretations as to validity and scope of the '257 patent claims in the 1984 final determination, noted that issues relating to the '257 patent were not subject to redetermination

in the 1985 advisory opinion proceeding, and rejected Allied's arguments for redetermining the scope and validity of the '257 patent claims. (CA371-377; CC399-405). The ITC pointed out that Allied had a full and fair opportunity to litigate the issues of the scope and validity of the '257 patent claims in the 1984 proceeding, and emphasized Allied's above-noted agreements not to relitigate these issues, including validity and claim interpretation, in the 1985 advisory opinion proceeding. (CA375-377; CC403-405).

The ITC also noted that at the conclusion of the 1984 investigation, Allied had unquestionably embraced the ID's holding that the '257 patent claims were properly construed as requiring the critical parameters relating to the width of the nozzle lips in order to save their validity. (CA376; CC404).

On June 17, 1987, the ITC issued an Action and Order modifying the October 15, 1984 general exclusion order based on the holdings in its advisory opinion. The ITC stated in the accompanying "Views of the Commission" that the original exclusion order did not expressly incorporate the critical limitations concerning the width of the casting nozzle lips used in the '257 patent process. (CA410). The modified exclusion order incorporated the critical limitations from the '257 patent specification which had been inherently incorporated in the 1984 general exclusion order.

Allied then appealed the ITC's May 1987 advisory opinion and June 1987 modification of the exclusion order to the Federal Circuit. In its appeal to the Federal Circuit, Allied argued that the ITC erred in construing the claims as requiring wide lips, and that the ITC should have held the claims to be valid over

the prior art under 35 U.S.C. §103 without interpreting them to require wide lips.

SUMMARY OF THE ARGUMENT

Allied waived and abandoned the particular issue of claim construction relating to "wide lips" before the ITC in 1984 because it did not request review of this issue in its 1984 petition for review of the ID to the ITC as required by 19 C.F.R. §210.54. Moreover, Allied affirmatively abandoned this issue of claim construction by telling the ITC in 1984 that the ID properly construed the claims as requiring "wide lips" and by telling the ITC not to review this issue of claim construction.

The case law indisputedly establishes that a party can not be allowed to raise an issue on appeal at a later time after it successfully urged below that the agency should not review the issue.

The decisions cited by Allied are inapposite because they are concerned with different statutes, do not involve an agency rule similar to 210.54(a)(2) and do not involve express abandonment of an issue.

Allied was not denied due process inasmuch as it participated in two adversary proceedings before an administrative law judge and twice petitioned the ITC for review. Due process is not denied when an appeal court declines to review an issue on the grounds that the appellant had failed to raise the issue below and had affirmatively abandoned the issue below.

Accordingly, the petition for a writ of certiorari should be denied.

ARGUMENT

I. The Federal Circuit Followed Well Established Precedent In Holding That Allied Abandoned The Particular Claim Construction Issue It Now Seeks To Have Reviewed

Although Allied in its petition to this Court broadly states that it sought to have the Federal Circuit review the issue of "claim construction", Allied, in a calculated effort to mislead this Court, has failed to tell this Court that its appeal to the Federal Circuit was based on one particular issue of claim construction. This issue is whether Allied's patent claims should be construed to require "wide lips" on the nozzle used to manufacture the amorphous metal article. It is this *particular issue* of claim construction which the Federal Circuit held Allied had abandoned by its failure to raise the issue in its 1984 petition to the ITC for review of the A.L.J.'s 1984 ID.[3]

In holding that Allied abandoned this particular issue, the Federal Circuit followed the plain meaning of the ITC's rules, general principles governing administrative proceedings, and precedent of the Federal Circuit and this Court.

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[3] Allied is precluded from judicial review of claim construction, validity and infringement issues on other grounds as well. Allied is estopped under principles of judicial estoppel or the doctrine of preclusion of inconsistent positions from arguing that the ITC's 1984 and 1987 holdings as to validity and/or claim construction were erroneous. Allied is barred under the doctrine of collateral estoppel from relitigating all issues relating to validity and/or claim construction of the '257 patent claims. Allied is also precluded from raising all issues of claim construction because it did not raise these issues at the appropriate time in the 1987 proceeding from which the appeal to the Federal Circuit was taken.

ITC Rule 19 C.F.R. §210.54(a)(1)(ii) requires that a party filing a petition for review of an initial determination with the ITC specify the issues upon which review of the initial determination is being sought. Further, ITC Rule 19 C.F.R. 210.54(a)(2) states that any issue not raised in "the petition for review filed pursuant to this rule will be deemed to have been abandoned". Allied did not raise in its petition for review to the ITC in 1984 the issue which Allied sought to raise in the Federal Circuit, and admits so in its petition to this Court. Accordingly, the plain meaning of the ITC rules results in an abandonment of that issue by Allied.

The principle that a party waives or abandons any issue not raised at the appropriate time under a particular agency's practice (such as arguing an issue before an A.L.J. but not before the appropriate review board) is a well-entrenched tenet of general administrative law. *United States v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). The appropriate time for Allied to have raised its particular claim construction issue was when it filed its petition for review of the ID.[4]

The holding by the Federal Circuit that Allied abandoned its particular issue of claim construction is in accord with *Warner Bros., Inc. v. U.S. International Trade Commission*, 787 F.2d 562 (Fed. Cir. 1986) where Rule 210.54(a)(2) was interpreted as controlling

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[4] Allied was well aware of the need to raise claim construction issues in its petition for review of the ID, and, in fact, raised a number of such issues in its petition for review of the ID. See, Statement of the Case, *supra*, page 3. Allied, however, failed to raise the particular issue which was the subject of its appeal to the Federal Circuit.

a situation where a party files a petition for review of an ID, but does not raise a specific issue, resulting in abandonment of that issue.

Moreover, Allied went even further than abandoning its particular claim construction issue by not seeking ITC review in 1984. In responding to respondents' Joint Petition for Review of the ID on patent validity issues, which argued to the ITC that the A.L.J. erred in construing the '257 patent claims as including the wide lips to save their validity under 35 U.S.C. §§103 and 112, *Allied expressly and repeatedly told the ITC that the A.L.J. had properly construed the claims as including the critical feature of the wide lips of the nozzle and told the ITC not to review these issues.* See, Statement of the Case, *supra*, pages 4-5. (CC10129-10131).

Thus, Allied affirmatively abandoned in 1984 the particular issue on which it sought review in the Federal Circuit. Allied told the ITC in 1984 that the A.L.J. "properly construed" the claims (CC10130) and "correctly found" that the claims required the "critical" features of the wide lips (CC10131) to be valid under §112 and to patentably distinguish over extensive prior art. Incredibly, Allied asked the Federal Circuit to reverse these precise holdings that Allied previously urged upon the ITC. Understandably, the Federal Circuit declined to consider Allied's claim construction issue.

The ITC in 1984, at Allied's urging, did not grant respondent's petition for review with respect to wide lips, but instead adopted the ID with its wide lip claim construction. Based on that claim construction, the ITC upheld the validity of the '257 patent and issued a remedy in Allied's favor in the form of a general

exclusion order barring importation of amorphous metal alloys and products. The ID made it clear that without such a claim construction, the '257 patent would have been held invalid and no remedy would have issued. Allied has enjoyed the benefits of that claim construction and that general exclusion order ever since. In similar circumstances, this Court has prohibited a party from later attacking an agency decision which it had benefited from and which it earlier had proposed and endorsed. *Federal Power Commission v. Colorado Interstate Gas Company*, 348 U.S. 492 (1955).[5]

To allow a party who had argued successfully before an agency that a particular issue should not be reviewed by that agency, to later appeal the agency determination when that determination was no longer to that party's liking, would make a mockery of the judicial appeals process. Allied's argument that the issue was preserved for appeal because respondents had raised it is disingenuous. Allied was successful in convincing the ITC not to review that issue. Allied can not now reverse its position four years later and argue that the issue should be reviewed. Allied has cited no case which supports its ludicrous position

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[5] *See also, Lizut v. Dept. of the Army*, 717 F.2d 1391 (Fed. Cir. 1983) (holding that where a party files a response to a petition for review and endorses holdings in an initial decision, that party's endorsement effects a waiver of the party's right to appeal that decision to the Federal Circuit); *James v. Federal Energy Regulatory Commission* 755 F.2d 154, 155-6 (Fed. Cir. 1985); *Connolly v. U.S. Dept. of Justice*, 766 F.2d 507, 510 n.2 (Fed. Cir. 1985); *Rockwell v. Dept. of Transportation, F.A.A.*, 789 F.2d 908, 913 (Fed. Cir. 1986); *Allred v. Department of Health and Human Services*, 786 F.2d 1128, 1130 (Fed. Cir. 1986).

that it should have the right to argue successfully against agency review at the agency level, obtain and enjoy the benefits of the agency decision, and then have the right to seek review of the decision when the decision no longer serves Allied's purpose.

In an attempt to avoid the holding of abandonment in 1984, Allied also misleadingly states as fact that the ITC advanced different claim constructions over the period of four years, and that the ITC's 1987 claim construction from which it appeals is different from the ITC's 1984 claim construction. The ITC in 1987 and the Federal Circuit in its decision considered Allied's arguments that the 1987 claim construction differed from the 1984 claim construction. In 1987, the ITC noted that issues relating to the '257 patent were not subject to redetermination in the advisory opinion proceeding, that Allied agreed not to litigate the issue of claim interpretation in the advisory opinion proceedings, and rejected Allied's arguments for redetermining the scope and validity of the '257 patent. Similarly, the Federal Circuit, in considering Allied's argument that the ITC's 1987 claim construction differed from the 1984 claim construction, found the argument to be "disingenuous". (A17). The Federal Circuit found that the ITC's 1987 determination stated the same parameters as the ITC's 1984 determination.

II. The Legal Authorities Cited By Allied Do Not Support Its Position On The Narrow Question Presented For Review And Do Not Establish A Conflict Among The Circuits

Allied states that even though it did not raise the "claim construction" issue in 1984, respondents raised it in their petition for review and therefore the issue

was preserved for appeal.[6] Allied argues that the Federal Circuit departed from the holdings of other federal courts of appeal which sometimes have permitted an appeal if an agency has been alerted to an issue and has had an opportunity to consider it, regardless of whether the person seeking review of the agency's ruling is not the one who initially raised the issue. However, none of the cases cited by Allied deals with an appeal in which the appellant had argued affirmatively before the agency that review of the issue by the agency was not necessary, and that the holding on that issue had been correctly decided by the A.L.J. Further, none of the cases cited by Allied was concerned with an agency rule that specifically stated that a party abandoned an issue if that party did not raise the issue in its petition for review before the agency. Thus, there is no conflict among the federal circuit courts as alleged by Allied.

In *Safir v. Kreps*, 551 F.2d 447 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 820 (1977) and in *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987), the D.C. Circuit dealt with the statutory review provisions of two legislative acts under review. Neither of these acts specifically required exhaustion of administrative remedies or participation in rulemaking proceedings as prerequisites to seeking judi-

[6] Allied does not explain and HML does not agree with Allied's premise that the particular issue of claim construction which Allied now seeks review of was raised in 1984 by respondents or "joined". Further, even if Allied is given the claim construction it now desires, the '257 patent would be invalid under 35 U.S.C. §112 because in 1984 Allied did not raise in its petition for review of the ID the issue of validity under §112, i.e., the holding that the claims are invalid under §112 unless construed in light of the specification as including "wide lips".

cial review. The D.C. Circuit stated in these two cases that exhaustion of remedy is a generally recognized common law principle, and under common law principles it would permit judicial review of those issues which an agency had been clearly alerted to and the agency had an opportunity to consider, even if the person seeking review is not the same one who originally raised it.[7]

In these two cases, the D.C. Circuit was not concerned with a validly promulgated agency rule which specifically states that a party petitioning the agency for review abandons any issue which it does not raise in its petition for review.

Further, these cases were not concerned with and do not address the issue of abandonment resulting from a party below affirmatively telling an agency that an issue had been correctly decided by an A.L.J. and should not be reviewed by the agency and then reversing its position on appeal and arguing before the appeal court that the issue was incorrectly decided by the agency and should be reviewed by the appeal court.

In *Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948 (6th Cir. 1971), the Sixth Circuit, in permitting a party who had not raised an issue below to raise the issue on appeal, dealt with a specific

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[7] A third D.C. Circuit case cited by Allied recently has been vacated for the second time by the D.C. Circuit, and therefore it is not commented on here. *Center for Auto Safety v. Thomas*, 806 F.2d 1071 (D.C. Cir. 1986), vacated 810 F.2d 302 (D.C. Cir. 1987) (per curiam) (en banc), reinstated 847 F.2d 843 (D.C. Cir. 1988) (per curiam) (en banc), vacated 856 F.2d 1557 (D.C. Cir. 1988) (per curiam) (en banc).

statutory provision, 47 U.S.C. §405 then in effect, which specifically authorized the review of any issue as long as anyone had previously raised that issue. Such a statutory scheme, which obviously precludes an agency rule on abandonment such as 210.54(a)(2), is not present in the instant case.

In *Local 512, Warehouse and Office Workers' v. NLRB*, 795 F.2d 705 (9th Cir. 1986), the Ninth Circuit interpreted the specific statutory review provision of the National Labor Relations Act (NLRA) which in pertinent part stated that "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Section 10(e) of the NLRA, 29 U.S.C. §160(e).

After holding that the petitioner had taken sufficient steps below to adequately preserve the issue for which judicial review was sought, the Ninth Circuit, in commenting generally on the statutory scheme of the NLRA, stated that once the issue is raised before the NLRB, another party may litigate the issue on appeal.

Thus, *Local 512* was based on a statutory scheme which is not present in the instant case and which precludes a rule corresponding to 19 C.F.R. 210.54 which is at issue here.

None of the cases cited by Allied support its position or establishes a conflict.

III. Allied Was Not Denied Due Process By The Federal Circuit

As stated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the fundamental requirement of due process

is the opportunity to be heard at a meaningful time and in a meaningful manner. In the present case, Allied had the opportunity to present its case. Allied participated in two adversary proceedings before an administrative law judge and twice petitioned for review to the ITC. Accordingly, Allied has not been denied "an opportunity to be heard" and has not been denied due process. *See, Saharoff v. Stone,* 638 F.2d 90 (9th Cir. 1980).

Allied argues that the unavailability of judicial review is a denial of due process. However, judicial review is not necessarily an essential element of due process and not all denials of access to judicial review amount to due process violation. *See, Saharoff,* 638 F.2d at 92.

Where the denial to judicial review is the result of an appellant not meeting a valid requirement imposed by the proceedings below, there is no denial of due process. *Saharoff.*

Allied has cited no case which supports its argument that an appeals court denies an appellant due process when it holds that it will not consider an issue on appeal which the tribunal below had the power and jurisdiction to decide because the appellant not only failed to raise the issue below, but affirmatively abandoned it below.

Appellants are often denied access to judicial review because they failed to exhaust their administrative remedies. Such failures result in forfeiture of their opportunity for meaningful review, and do not give rise to a denial of due process. *Steebe v. U.S. Railroad Retirement Board,* 708 F.2d 250 (7th Cir. 1983), *cert. denied,* 464 U.S. 997 (1983); *Reid v. Engen,* 765 F.2d

1457 (9th Cir. 1985). Such is the case here. Allied could have obtained judicial review if it had first filed an appropriate petition for review of the ID to the Commission in 1984 on the particular claim construction issue on which it now seeks review and if it had not affirmatively abandoned that particular issue. Allied's inability to obtain judicial review is not the result of a denial of due process, but the result of its own action.

Allied argues that 1984 was not a meaningful time for Allied's objections to the ITC's 1987 claim construction to be heard and that it is the 1987 claim construction that was the subject of Allied's appeal to the Federal Circuit. Allied argues that it had cause to seek judicial review of the claim construction issue only in 1987 when the ITC found respondents' revised processes non-infringing, and that Allied could only have speculated in 1984 as to whether the 1984 claim construction might pose problems in the future. These arguments of Allied are fundamentally flawed because as the ITC and Federal Circuit found, the 1987 and 1984 claim construction on which Allied sought review were the same. (A17) (A31-35). Moreover, Allied's argument that it would have been premature and speculative to raise "the claim construction issue" in 1984 did not stop Allied in 1984 from raising other claim construction issues. See, Statement of the Case, *supra*, page 3. Allied simply failed in 1984 to raise all the claim construction issues which it could have and should have raised, and affirmatively abandoned the issue which it now seeks to review. It was this failure and abandonment, not a denial of due process, which precluded judicial review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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